APPEAL OF

JAMES CRACOLICE AND DAWN CRACOLICE

COUNTY OF SANTA CRUZ
PLANNING DEPARTMENT

Application 141212
ZONING ADMINISTRATOR
APPEAL RECEIPT 11/20/15
CHECK # 5647 $1200.00
FROM DAWN + JIM
CRACOLICE DATED 11/20/15
PLANNING STAFF:
Sheila McDaniel
Sheila McD

EXHIBIT 1A

TABLE OF CONTENTS

EXHIBIT 1A

James Cracolice and Dawn Cracolice ("Appellants") submit this Appeal pursuant to Santa Cruz County Code § 18.10.310.

I. The Act or Determination Appealed From:

Appellants appeal the County of Santa Cruz's approval of Commercial Development Permit No. 141212 for the construction of a cell tower and wireless communication facility ("Project") on the property located at 24733 Loma Prieta Avenue, APN: 098-021-06 ("Subject Property").

Appellants further appeal the Notice of Exemption for CEQA issued in connection with the Project.

II. The Identity of the Appellants and Their Interest in the Matter:

James Cracolice and Dawn Cracolice reside at 24930 Loma Prieta Avenue, Los Gatos, California, which is located directly across the street from, and within 20 feet of, the Subject Property. For the reasons stated herein below, Appellants, and their young son, will be adversely impacted by the Project, and have been aggrieved by the acts and omissions of the County.

III. Statement of the Reasons which Render the Acts and Omissions of the County Unjustified and Inappropriate

A. The County Failed to Give Appellants the Required Notice for the Public Hearing and Its Practices and Policy Concerning Such Notices are Unlawful

Appellants live directly across the street from, and within 20 feet of, the Subject Property. Their residence is located in Santa Clara County. The Subject Property is located in Santa Cruz County. The County scheduled the public hearing for the Project for November 6, 2015. The County then mailed notice of the public hearing to residents within 300 feet of the Subject, but only to residents living in Santa Cruz County. Sheila McDaniel stated to Appellants that it is not the practice of the County to send notices to residents in other counties, and she acknowledged that notice was not sent to any Santa Clara County residents, including Appellants.

County Code § 18.10.223(A)(3) states in relevant part that: "The County shall mail notices in the form of a postcard or letter not less than 10 calendar days prior to the public hearing to the applicant and to the owners of ***all*** property within 300 feet of the exterior boundaries of the subject property[.]" Section 18.10.223 does not say that notices need only be mailed to owners of property in Santa Cruz

County. It requires notice to be sent to owners of ***all*** property within 300 feet of the Subject Property. The County failed to comply with this notice requirement, and as a consequence, Appellants were not given notice and were denied the opportunity to participate at the public hearing.

The County's notice was also defective because it failed to post the notice of the hearing on the Subject Property as required by County Code § 18.10.223(A)(2). In addition, County Code § 13.10.661(H) states that "due to the potential adverse visual impacts of wireless communication facilities the neighboring parcel notification distance for wireless communication facility applications is increased from the normal 300 feet to 1,000 feet from the outer boundary of the subject parcel", and the Count is required to place visual mock-ups on site. The County did not comply with these requirements. No notice was given to the Santa Clara County residents within 1,000 feet and no on-site visual mock-ups were placed on the subject property.

The practice and policy of the County in failing to send notices to owners of all property within 1,000 feet is unlawful and contrary to its own County Code. Further, even if the County Code could be interpreted to support the County's practice and policy, then it would be in violation of the equal protection clause.

B. <u>The Project Violates the Noise Regulations that are Set Forth in the General Plan</u>

The applicant submitted, and the County approved, an Environmental Noise Analysis that was severely flawed, and even misleading at points.

First, the applicant's analysis misrepresents the allowable noise levels, stating that during nighttime from 10 p.m. to 7 a. m. the allowable level for an hourly average is 45 dB and maximum level is 65 dB. The General Plan, however, states that "All levels shall be reduced 5 dB if the ambient hourly L_{eq} is at least 10 dB lower than the allowable level". General Plan, p. 6-33, Fig. 6-2. The subject property is located in one of the most serene and quiet locations within the county and the ambient noises levels are much more than 10 dB lower than the allowable level. Thus, the allowable levels during nighttime are an average of 40 dB and maximum 60 dB.

Second, the applicant's analysis is hopelessly flawed because it does not even use the noise levels generated by the HVAC equipment that will actually be used on the Project. Instead, the analysis uses a different HVAC unit saying on page 4 that it "is reportedly similar to the type of equipment being

proposed at the project site". A proper analysis would use the equipment that will actually be used on the Project. It is certainly not acceptable to say that the HVAC equipment is "reportedly similar" without stating who made such a report and on what basis. No reliable conclusions can be drawn about the noise levels of the HVAC equipment until the applicant provides noise data from the equipment that will actually be used. The HVAC equipment that will be used may actually generate noise far greater than that used in the analysis.

Third, another disturbing aspect of the flawed analysis is found where it states at page 3 that "the high frequency noise generated by cellular cooling fans (the only source of noise associated with the equipment cabinets), dissipates rapidly over distance". This statement reflects a fundamental misunderstanding of noise generated by HVAC equipment. In fact, noise is generated by compressors, condenser fans and blowers, each with their own motors that can be extremely noisy. The analysis states, without any supporting documentation, that the equivalent of the Bard unit will be 3-ton in capacity and will generate 67 dB of noise. But this statement is made without any load calculations. Summer nights at the subject property can be very hot, with significant cooling loads to cool the heat that must be moved from the structure. Yet the analysis, without considering any of these factors, then goes on to assume, again with any supporting documentation, that the noise will dissipate -6 dB per doubling distance. These contrived figures are used to arrive at noise levels of 39 dB at the property line. All we know is that according to the report, the noise levels are 67 dB at 10 feet from the unit. The actual noise levels could be much higher. And if the noise does not dissipate by half over two hundred feet, which is literally unbelievable considering how well noise carries in the area where the Project is situated, then noise levels at the property line will be far greater than allowed by the County General Plan.

The analysis of the generator is equally flawed. Even with the unsupported assumption of massive dissipation as the noise travels only 260 feet to the property line, the generator creates noise far beyond the allowable levels. Furthermore, although the analysis never mentions this, noise from both the HVAC equipment and the generators – which will be running at the same time – is 95 dB at the property line, which is 237 percent of the allowable levels. Again, that is using the unsupported and understated numbers in the analysis. The analysis ultimately dismisses these severe violations of the

EXHIBIT A

noise regulations by saying "It is expected that nighttime operation of the project emergency generator would be exempt from the County's exterior noise criteria due to the need for continuous cellular service provided by the project equipments." This statement is not true. The County cannot exempt this Project from the noise regulations that are set forth in the General Plan. Thus, the Project documents themselves fully acknowledge and admit that the Project does not comply with the General Plan.

It should be noted that the excessive noise from the HVAC equipment will be heard all the time. The tranquility of the area is certain to be ruined. Further, power outages are common where the Project is situated, and such outages can last for days. So the blasting noise of the generator will further damage the area as well as the residents that will be forced to endure it.

The fact that the County staff would rubber-stamp such a flawed noise analysis is extremely disturbing. In fact, the Staff Report at page 4 fully endorses the analysis and deliberately omits the fact that the report acknowledges that the generator violates the noise regulations in the General Plan.

C. The Notice of Exemption Should Not have been Issued because the Project is Subject to an Exception to the Categorical Exemption Invoked by the County

Even though the lead agency may issue a notice of exemption, a party may nonetheless challenge that exemption by showing that the project is not exempt because it falls within one of the exceptions. The most common exception is raised under CEQA Guidelines § 15300.2(c): "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." A party invoking that exception may establish an unusual circumstance without evidence of an environmental effect by showing that the project has some feature that distinguishes it from others in the exempt class, such as its location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance. Alternatively, a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, if convincing, necessarily also establishes "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086, 1105, as modified (May 27, 2015), reh'g denied (May 27, 2015) (*Berkeley Hillside*).

EXHIBIT 1A

1. **The High Fire Hazard in the Area where the Project is Located is an "Unusual Circumstance" that has a Significant Effect on the Environment**

The Project is not some in-fill development in an existing neighborhood, which would be the appropriate use of a Class 3 Categorical Exemption. Rather, the Project is located in an area with a high fire hazard, in the mountain region that is currently facing a severe drought, and in a field that over the past 10 years has been densely covered by highly flammable brush. And in this fire hazard, the County has now approved the placement of a tank of flammable and explosive fuels that will be unattended. In addition, the fake trees that will be erected to serve as the tower will be subjected to extreme winds, which are common along the Summit. These winds have the potential to knock down the tower, snap antennae, which, along with other potential malfunctions, can cause a fire to be ignited. In that location, if the unmanned and unattended tower does start a fire, it is a fire that could be catastrophic. It could set the mountains on fire. This is an "unusual circumstance". The County should never have invoked a categorical exemption. The application should include a careful and comprehensive study of the fire hazard that exists.

2. **The Project Violates the General Plan's Noise Regulations and Thus Will have a Significant Environmental Effect**

As discussed above, the project generates excessive noise and violates the noise regulations. This alone is sufficient to create an exception to categorical exemption.

3. **The Subject Property is the Habitat of a Fox, Perhaps an Endangered Species, which is an "Unusual Circumstance" that has a Significant Effect on the Environment**

Appellants have seen and heard the fox that lives on or near the Subject Property. The fox uses that property as its habitat. In the middle of nights this past summer, Appellants heard the fox making its unique and remarkable calling sound. On numerous occasions Appellants saw the fox walking across the Subject Property. Appellants have not determined what type of fox lives there, but given that the San Joaquin Kit Fox, an endangered species, is known to live in Santa Cruz County, a study should be done to determine what type of fox uses the Subject Property as its habitat and whether the Project will adversely impact the fox.

EXHIBIT A

4. Native American Remains and Artifacts on the Property are an Unusual Circumstance

The Subject Property has been designated as a site that potentially contains Native American remains and artifacts. This fact alone constitutes an unusual circumstance barring application of a categorical exemption.

D. The County Should Prepare an Environmental Impact Report

The County should set aside the categorical exemption and should prepare an Environmental Impact Report (EIR) that properly studies all the potentially significant environmental effects, including without limitation, the fire hazard, noise violations, fox and other wildlife habitats, and archaeological resources.

In addition, the EIR should properly include a thorough analysis of the environmental effects of the Project's RF Radiation on nearby residents as well as on birds and other wildlife. Even if federal law prohibits the County from denying a cell tower project based upon emissions of RF Radiation, that does not mean that such a significant environmental effect should not be examined in an EIR in compliance with CEQA's requirements.

E. The Project, and Zoning Ordinance that Purportedly Authorizes It, are Inconsistent with the General Plan

The General Plan establishes a residential district that prohibits health and safety hazards such as that from commercial and industrial facilities such as the cell tower. The zoning ordinance is inconsistent with the GP in that it allows for individuals living in residential areas to be exposed to those hazards and does not require the necessary setbacks and buffer zones to avoid those hazards.

To the extent that County Code § 13.10.663(B)(11) is deemed by the County to eliminate or reduce the Noise regulations set forth in the General Plan, the ordinance is invalid.

F. Failure to Establish a Procedure for Timely Review of Appeal

The County has failed to adopt a review procedure that allows for the appeal of notices of exemption in a manner that is consistent with the filing deadlines of CEQA. CEQA requires that a lawsuit be filed within 35 days. The County's review of an appeal can take up to 60 days. If an appellant waits for the appeal to be decided, then the appellant will not be able to file the lawsuit within

EXHIBIT A

the statute of limitations. The County's procedure is unfair, at odds with the requirements of CEQA, and violates due process.

G. The Project should have Been Denied because it is Inconsistent with the Williamson Act Agricultural Preserve Contract

The Subject Property is bound by a Williamson Act agricultural preserve contract. In an effort to justify approval of this Project, the County made five findings, none of which are supportable.

The first finding is that the Project "will not reduce, restrict, or adversely affect agricultural resources". The County claims that the "proposed wireless facility will not reduce, restrict or adversely affect current or future agricultural operations given the incidental nature of the proposed project". This finding is without basis. Although the property is 29 acres, most of that land is steep slopes and not suitable for agriculture. Only two or so acres are level and can be used for agriculture. Of that land, much of it is impacted by the 400 feet or so of a 15-foot wide gravel road that will be constructed, the more than 250 of an utility easement with underground electrical lines to service the structure, and the structure itself and the necessary setbacks from it. The proposed facility actually significant reduces the amount of land that will be available for agricultural use in the future.

The second finding is that the wireless facility "is incidental to a potential agricultural use". That statement is simply not true. The cell tower facility is in no way related to, or incidental to, any potential agricultural use.

The third finding is that "the use consists of an interim public use which does not impair long-term agricultural viability. This is not correct. The facility is permanent and, as discussed above, it removes a significant portion of the available agricultural land on the Subject Property.

The fourth finding is that "single family residential uses will be sited to minimize conflicts". This finding illustrates how little attention the County gives to these boilerplate findings. Obviously, this finding is inapplicable. There are no single family residential uses in the Project.

The fifth finding is that the Project is sited "to remove as little land as possible from production" (or from potential production). This finding is also not true. In fact, the Subject Property is 29 acres. Only a few of those acres can be used for agriculture. The facility could have been sited on the Subject

EXHIBIT 1A

Property on its south section in an area that is not suitable for farming. But instead it was located land that is suitable for farming, and thus removes that land from agricultural use in the future.

The five Agricultural Development Findings made the County are baseless. The Project is not consistent with the Williamson Act agricultural preserve contract and thus should have been denied.

H. The County did not Comply with the County Code for Wireless Communications Facilities

The County has failed to comply with its regulations for the siting, design, and construction of wireless communication facilities, in numerous ways, including without limitation:

The County failed to ensure that the Project was located and designed "so as to minimize negative impacts, such as, but not limited to, visual impacts, agricultural and open space land resource impacts, impacts to the community and aesthetic character of the built and natural environment, attractive nuisance, noise and falling objects, and the general safety, welfare and quality of life of the community." County Code §13.10.660(A)

The County did not require an adequate "detailed description of the proposed measures to ensure that the public would be kept at a safe distance from any NIER transmission source associated with the proposed wireless communication facility". County Code §13.10.662(B)(10)

The County did not require on-site visual demonstration structures (i.e., mock-ups) for the Project. County Code § 13.10.662(D).

The County should have procured, but did not procure, additional information and data as may assist in reviewing the following: (1) reports concerning conformance with the FCC RF radiation exposure levels; (2) reports concerning the need for a facility; and/or (3) reports concerning availability or suitability of alternatives to a proposed facility. County Code § 13.10.662(F).

IV. If this Appeal is not Ruled upon Promptly, Consistent with Filing Deadlines of CEQA, then Appellants will Deem that It has been Denied and will File Suit within the Statute of Limitations

Appellant Jim Cracolice spoke with Senior Planner Sheila McDaniel by phone on November 17, 2015. Appellant informed her that if the County denies the appeal, then Appellants will be filing an action in Superior Court. He further explained that the deadline for bringing an action challenging a

EXHIBIT 1A

Notice of Exemption is 35 days from the date that the exemption is issued. He then explained that it would therefore be necessary for the County to rule on the appeal promptly, well within 35 days, so that if the County denies the appeal, Appellants will have sufficient time to file the action.

Ms. McDaniel told Appellant that the County typically takes 60 days to rule on such an appeal. Appellant then said that if he waits the 60 days for the County to rule and it ends up denying the appeal, the County will then argue that it is too late for Appellants to bring an action in Superior Court. Ms. McDaniel had no explanation as to why the County did not have a procedure in place that was consistent with the CEQA filing deadlines. Appellant asked her to tell him if she was aware of any procedures adopted by the County for mandatory administrative appeals of exemptions that were consistent with CEQA. Ms. McDaniel said that she was not aware of any. Appellant sent Ms. McDaniel an email confirming their discussions and asked that she forward it to the County's attorney, or some other staff person, and asked that he be sent any such procedures. Appellant confirmed in the email that Appellants want to exhaust whatever administrative remedies the County has in place concerning a challenge to the Notice of Exemption, provided that such procedures are consistent with the filing deadlines for CEQA and allow them sufficient time to prepare a Petition for Writ of Mandate in the event that the appeal is denied.

The following day, Ms. McDaniel sent Appellant an email acknowledging that the County did not have any procedure in place that would allow for the review of an appeal of the issuance of the Notice of Exemption in a manner that is consistent with the filing deadlines of CEQA. Ms. McDaniel stated in her email, sent November 19, 2015 at 9:39 a.m.:

> "I spoke with counsel and we agreed that if the Clerk has filed the CEQA exemption the Department would re-file the exemption following consideration of appeal of the Zoning Administrator's decision. This would ensure that a potential CEQA appeal would follow the hearing appeal. The Clerk of the Board is now confirming if the exemption has been filed or not and if it has not been filed we would not file it until following the appeal period."

It was useful that the County acknowledged that its policy of filing notices of exemption upon the approval of a project, and then not providing for a decision on any appeal of such an exemption for

EXHIBIT 1A

60 days, is inconsistent with CEQA's 35-day statute of limitations. The solution proposed by the County, however, does not resolve the defects in the County's procedures. If the exemption was filed, then the County has triggered the time that will run on the filing deadline. The County's offer to re-file the exemption does not toll the limitations period. Furthermore, even if the notice of exemption has not yet been filed, there is no assurance for an appellant that the County will not file a notice of exemption sometime before the appeal is decided. In such a case, the appellants that wait for the ruling on the appeal will have been denied the opportunity to file a lawsuit. The County's procedures violate Appellant's due process rights.

Accordingly, Appellants require that the County rule on this appeal by November 30, 2015. If the County does not rule upon it, Appellants will deem that it has been denied and will file their lawsuit in Superior Court on December 1, 2015. Otherwise, Appellants will be denied their right to bring a CEQA action challenging the County's acts and omissions in connection with the Project.

Respectfully Submitted,

APPELLANTS

James Cracolice Date: 11/20/15

Dawn Cracolice Date: 11/20/15